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September 29, 1994

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SEP 29 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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VIA HAND DELIVERY

Mr. William F. Caton  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

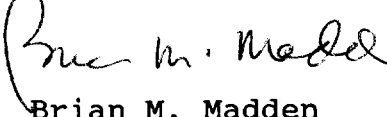
Re: MM Docket No. 94-70

Dear Mr. Caton:

On behalf of Orville Ronald Brandon, the court-appointed Receiver for Ceder Carolina Limited Partnership, licensee of Station WJYQ(FM), Moncks Corner, South Carolina, there are transmitted herewith an original and four copies of his Reply to Opposition to Motion for Summary Dismissal.

If any additional information is desired in connection with this matter, please contact the undersigned counsel.

Very truly yours,

  
Brian M. Madden

Enclosure

BMM/tlm

cc w/encl.:

Sharon P. McDonald  
Gary S. Smithwick, Esq.

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

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[SEP 29 1994]

In the Matter of	)	
	)	FEDERAL COMMUNICATIONS COMMISSION
Amendment of Section 73.202(b)	)	OFFICE OF SECRETARY
Table of Allotments	)	MM Docket No. 94-70
FM Broadcast Stations	)	RM-8474
(Moncks Corner and Kiawah Island,	)	
South Carolina)	)	

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To: Chief, Allocations Branch

**REPLY TO OPPOSITION TO MOTION FOR SUMMARY DISMISSAL**

Orville Ronald Brandon, the court-appointed Receiver for Ceder Carolina Limited Partnership (the "Receiver"), licensee of broadcast Station WJYQ(FM), Moncks Corner, South Carolina, by his attorneys, hereby replies to the *Opposition to Motion for Summary Dismissal* (the "*Opposition*") filed by Sampit Broadcasters ("SB") in the above-referenced proceeding. As demonstrated herein, the *Opposition* represents an impermissible and untimely attempt to remedy the fatal defects in the *Comments and Counterproposal of Sampit Broadcasters*, (the "*Counterproposal*"), filed with the Commission on August 12, 1994, and constitutes a glaring abuse of established Commission processes.

Station WJYQ is authorized, pursuant to a valid construction permit, for construction and operation on Channel 287C3 at Moncks Corner. At the station's request, in this proceeding the Commission has proposed the amendment of Section

73.202(b) of the rules to upgrade the station to operate on Channel 288C2 at Kiawah Island, as that community's first local service, and to modify the construction permit of Station WJYQ accordingly. The Receiver filed comments in support of this proposal on August 26, 1994, as the licensee of Station WJYQ.

In the *Counterproposal*, SB unequivocally proposes that the Commission make a series of three interdependent changes to the FM Table of Allotments: the allocation of Channel 288A to Kiawah Island; the substitution of Channel 287A instead of Channel 287C3 at Moncks Corner; and the allocation of Channel 289A to Sampit, South Carolina. Thereafter, the Receiver filed Reply Comments and a *Motion for Summary Dismissal* ("Motion"). In the *Motion*, the Receiver established that the *Counterproposal* must be dismissed because of significant procedural deficiencies: SB failed to include an expression of interest in applying for two of the three channels it proposed, as required by established Commission precedent; moreover, the proposals required involuntary downgrades in station class to the proposed improvement to, and/or the authorized facilities of, Station WJYQ. In its *Opposition*, SB belatedly attempts to repair these fatal procedural defects in the *Counterproposal* by backpedaling from its original proposal for three new allotments. As will be shown herein, the *Opposition* represents an irresponsible abuse of

the Commission's processes and compels summary dismissal of SB's *Counterproposal*.

There can be no question that SB has intentionally advanced three distinct allotment proposals in this proceeding: the allocation of Channel 289A to Sampit, South Carolina; the allotment of Channel 288A at Kiawah Island, South Carolina, instead of Channel 288C2, as requested by the Receiver; and the forced downgrade of the present allotment of Channel 287C3 at Moncks Corner, South Carolina, to Class A status. No matter how SB tries now to reconstruct its position, the portion of its *Counterproposal* at page 2, which is labeled simply "Counterproposal," leaves no doubt about what SB has requested.

In the *Motion*, the Receiver identified the numerous deficiencies in the SB allotment plan which compel its summary dismissal, and supported his position with citations to Commission precedent. SB tries to distinguish these cases, but its effort is both unavailing and illogical.<sup>1/</sup> For example, SB contends that it was required only to represent an expression of interest in but one of its three allotment proposals, that for Channel 289A at Sampit. *Opposition* at 4. SB claims that it "was

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<sup>1/</sup> That this pleading does not detail with particularity each of the errors in SB's analyses of case precedent is not to be taken as any indication that the Receiver agrees with or accepts SB's characterization of these cases.

precluded from expressing an interest in the Kiawah Island allotment" by Section 1.420(i) of the Commission's rules, presumably since the proposal to modify the construction permit for Station WJYQ to specify operation on Channel 288C2 at Kiawah Island is mutually-exclusive with the authorized facilities of Station WJYQ on Channel 287C3 at Moncks Corner. *Id.* What SB fails to acknowledge is that it is obligated to represent its interest in its own proposal for Channel 288A at Kiawah Island. The fact that the Receiver's allotment proposal is mutually-exclusive with the authorized facilities of Station WJYQ only "precludes" SB from indicating its interest in Channel 288C2 at Kiawah Island. As SB has advanced a different allotment, Section 1.420(i) of the rules has no "preclusive" effect and SB is required to meet all of the usual obligations of a petitioner in rule making.

Moreover, as previously established, SB's proposed allotment of Channel 288A to Kiawah Island and Channel 287A at Moncks Corner can only be made by forcing the Receiver to accept a lower class allotment at Kiawah Island than he requested and a downgrade of the authorized facilities of Station WJYQ. Both proposals have been rejected by the Receiver. *Motion* at 5 and Declaration attached thereto. And, unless both inferior proposals are either accepted by or forced upon the Receiver,

neither can be made in accordance with the Commission's rules. *See Motion* at 4-6. SB's attempt to argue to the contrary is simply wrong.

What SB now contends is its position in this proceeding is a revisionist mischaracterization of the three clear and distinct elements of its original *Counterproposal*. Having been caught advancing unacceptable proposals for Kiawah Island and Moncks Corner, SB now submits that, all along, the "central component" of its *Counterproposal* is only the allotment of Channel 289A at Sampit. SB's abuse of the Commission's processes in this respect is as clear as are the three elements of its *Counterproposal*: SB has tried to present as many interrelated proposals as it can think of to confuse and complicate -- and delay -- this proceeding. Once the Receiver established the fatal deficiencies in the *Counterproposal*, SB now tries to retreat to whatever remaining ground it can find. By advancing allotment proposals (which it now for the first time describes as only "alternatives" for the Commission to consider) SB has wasted Commission staff time and resources and forced the Receiver to incur additional expense to prosecute the upgrade for Station WJYQ against an improper counterproposal.

But SB was not satisfied merely to tie up the Commission's resources and those of the Receiver. It has now

included otherwise uninvolved third parties, searching out Clary K. Butler and suggesting to him that there was a possibility that he could indicate his interest in Channel 287A at Moncks Corner. *Opposition* at 7-8. Even if one could accept SB's strained reading of *Amendment of FM Table of Allotments (Fisher, Illinois, et al.)*, 7 FCC Rcd 5223 (Allocations Branch, 1992), Mr. Butler's late-filed expression of interest is in direct conflict with Commission precedent and will never be accepted in this proceeding: the allotment proposed by SB for Moncks Corner is in conflict with an existing authorization, not a proposal for first service or a higher class channel, and SB's proposal for Moncks Corner does nothing to "remove[] the conflict between [SB's and the Receiver's] proposals." *Id.* at n.5. That SB so misrepresented the situation to Mr. Butler, who appears not to have counsel of his own, and has dragged him into this proceeding (while repeatedly emphasizing his minority status, a fact which is irrelevant in rule making) seems to be clearly irresponsible behavior. After inquiry, the Commission may deem it appropriate to sanction SB for its conduct in this regard.

Why would SB propose such a complex and interdependent set of allotments? If SB were honestly interested only in a new channel in Sampit (assuming SB can sustain its burden to establish that Sampit is qualified for an allotment in the first

place, a matter on which the Receiver has specifically reserved the right to comment), why would it also make specific allocation proposals at Kiawah Island and at Moncks Corner which SB knows are in conflict with proposed and authorized allotments and for which SB made no expression of interest?

The Receiver can only guess at this stage what the motivation of SB -- the principals of which have never been identified in any way -- could be. He has been made aware of a dispute which apparently exists between the principals of Ceder Carolina Limited Partnership, the entity for which Mr. Brandon has been appointed Receiver, and Atlantic Broadcasting Co., Inc. ("Atlantic"), licensee of Station WDAR(FM), Darlington, South Carolina. Indeed, the Receiver was thrust into the middle of this dispute immediately upon his appointment when counsel for Atlantic (who is also counsel for SB), filed an opposition to a pending request to extend the silent authority for Station WJYQ. This objection was submitted when Atlantic did not receive, apparently promptly enough for its purposes, assurances that Station WJYQ, authorized to serve Moncks Corner on Channel 287C3, would not be reactivated on its former Channel 288A; operation by Station WJYQ on its formerly licensed Class A channel would impede an upgrade of the Darlington station. As soon as the Receiver assumed the position of the licensee of Station WJYQ



following Commission authorization, he provided the requested assurance to Atlantic, and the objection was withdrawn. Perhaps it is merely a coincidence that the same law firm that represents Atlantic has filed the SB counterproposal. It is also curious that SB's consulting engineers, Bromo Communications, Inc., would so strongly oppose the allotment of Channel 288C2 when it prepared the technical showing in support of that allocation on behalf of Station WJYQ in MM Docket No. 91-127. One can only speculate that somehow this proceeding has become a battleground by proxy for whatever ill-will remains between Atlantic and Ceder Carolina Limited Partnership.

In a final burst of excess, SB ends its *Opposition* with a discourse entitled "Other Matters," which is, at the very least, utterly irrelevant to the deficiencies in SB's Counterproposal; yet it is those deficiencies that are the subject of the *Motion* to which SB's pleading is supposed to be addressed. It is true that Station WJYQ was forced off the air by the severe damage suffered from Hurricane Hugo and that the present licensee is a court-appointed Receiver. But there is absolutely no basis for SB's strongly worded accusation that the Receiver is "warehousing" the frequency. This is a serious charge, and should only be made upon proven facts. None exist here. As noted previously, the Receiver assumed control of the

station on August 11, 1994, following Commission approval of an involuntary assignment of license. It is a matter of record with the Commission that throughout the time when the station has been off the air, the then-current licensee of the station filed, and received approval of, requests to remain silent and to extend the station's authorizations, which authorizations have been, and remain today, in full force and effect. Counsel to SB is well aware of these facts, having recited them in the pleadings filed recently on behalf of Atlantic. The Receiver has been charged by the court to protect the assets of the station, and he continues to prosecute the upgrade proposal that was pending when he became the station's licensee in fulfillment of that mandate. SB's intemperate accusations against the Receiver are entirely unwarranted.

As demonstrated previously, the SB Counterproposal is procedurally deficient and cannot be accepted by the Commission. SB's attempt to avoid these deficiencies by recharacterizing its original counterproposal is improper and cannot be countenanced. For the reasons previously advanced and set forth herein, the

Receiver submits that the SB Counterproposal must be dismissed as unacceptable for filing without any substantive consideration.

Respectfully submitted,

ORVILLE RONALD BRANDON,  
RECEIVER FOR CEDER CAROLINA  
LIMITED PARTNERSHIP

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His attorneys


September 29, 1994

## **Certificate of Service**

I, Tamara L. Mariner certify that a copy of the foregoing "Reply to Opposition to Motion for Summary Dismissal" has been hand delivered this 29th day of September, 1994, to the following:

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